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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1973

BERNARD GRIZAFFI and LEONARD FALCONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Bernard Grizaffi and Leonard D. Falcone, defendants-appellants in the Court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Opinion of the Court Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reproduced in the Appendix to this Petition.

Jurisdictional Grounds

Petitioners seek review of the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the convictions of defendants following a jury trial in the District Court for the Northern District of Illinois. The judgment of the Court of Appeals was entered December 4, 1972. Rehearing was timely sought, and was denied January 2, 1973. Jurisdiction to review this judgment of the Court of Appeals is based on 28 U.S.C. §1254.

Questions Presented for Review.

1. On review of a judgment of guilty based on a jury verdict, should the Court of Appeals review the legal sufficiency of the evidence by looking only to the proof introduced during the government's case-in-chief, or may the Court look also to evidence introduced by the petitioners?

2. An unindicted co-conspirator was subpoenaed by and available to the government, but was not called as a witness; instead, the government "tendered" the witness to the petitioners, but the witness refused to speak to defense counsel, and he did not testify. Should the trial judge have instructed the jury that it might infer that the witness' testimony would have been harmful to the government?

3. Did the Court of Appeals invoke an improper standard in denying the admissibility of an expert accountant witness' testimony?

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The following statutes, for which violations were alleged, are set out in the Appendix to this petition:

18 U.S.C. § 371; § 657; § 1001; § 1006; § 1008; and § 1341.

Federal Rules of Criminal Procedure, Rule 29(a).

Statement of the Case

For purposes of this Petition, the abbreviated statement of the case contained in the opening section of the Opinion of the Court of Appeals is sufficient. Facts relevant to the questions raised in this Petition are concisely summarized below in the sections containing the argument regarding those questions. A full statement of the facts is found in the brief filed upon behalf of petitioners in the Seventh Circuit. Copies of the briefs filed by petitioners and the government will be lodged with the Clerk of this Court.

ARGUMENT

I.

The Holding of the Court of Appeals that the Petitioners Waived Their Right to an Acquittal by Introducing Defense Evidence is in Conflict with the Decisions of Another Court of Appeals and with the Fifth Amendment as Interpreted by this Court.

At the close of the government's case, petitioners moved for an acquittal under F.R.Crim.P. 29(a); the trial court denied the motion. Thereafter, each petitioner introduced evidence including his own testimony. At the close of all the evidence, petitioners again moved for an acquittal; this motion was also denied.

The Court of Appeals held that by presenting evidence in their behalf, petitioners waived their right to appeal the trial judge's ruling that the government's case-in-chief made out a *prima facie* case. The Court held that the sufficiency of the evidence must be weighed by considering the evidence presented by *both* the prosecution and the petitioners. The Court held that, tested by this standard, the evidence was sufficient to support a verdict of guilty.

The conflict among the Courts of Appeal as to whether presentation of evidence by the defendant waives error in a denial of a motion for acquittal at the close of the government's case-in-chief was set forth by Mr. Justice Douglas in his dissent from denial of certiorari in *Maffei* v. *United States*, 406 U.S. 938 (1972):

> "Seven courts of appeals, including the court below, have held that a federal defendant who presents evi-

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dence in his behalf thereby waives any error in a prior denial of a motion for acquittal made at the close of the Government's case. *United States* v. *Haskell,* 327 F.2d 281, 282, n. 2 (CA2); *United States* v. *Feldman,* 425 F.2d 688, 692 (CA3); *United States* v. *Cashio,* 420 F.2d 1132, 1134 (CA5); *United States* v. *Carabbia,* 381 F.2d 133, 138 (CA6); *Cline* v. *United States,* 395 F.2d 138, 144 (CA8); *Viramontes-Medina* v. *United States,* 411 F.2d 981, 982 (CA9); *United States* v. *Greene,* 442 F.2d 1285, 1286-1287, n. 3 (CA10). Two other courts of appeals, however, have held that presentation of a defense is not a waiver. *United States* v. *Rizzo,* 416 F.2d 734, 736, n. 3 (CA7); *Cephus* v. *United States,* 117 U.S.App.D.C. 15, 324 F.2d 893."

The confusion existing on this point of law is illustrated by the fact that on the same day Mr. Justice Douglas filed his dissent in *Maffei,* the Court of Appeals for the Seventh Circuit applied the "waiver" interpretation of Rule 29(a) in *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir. 1972). The opposite holding by the Seventh Circuit in *United States* v. *Rizzo,* 416 F.2d 734, 736 (7th Cir. 1969) was not adverted to in *Tubbs,* even though two of the three members of the *Tubbs* panel had been on the *Rizzo* panel, and the same Judge wrote both opinions.* In the case at bar, the Court of Appeals cited and followed *Tubbs* without discussing *Rizzo.*

The division among the Courts of Appeal has lasted since 1963, when the Court of Appeals for the District of Columbia Circuit decided *Cephus* v. *United States,* 324 F.2d 893 (D.C. Cir. 1963). *Cephus* has been reinforced by later decisions such as *Austin* v. *United States,* 382 F.2d 129, 138

* In fairness to the Court of Appeals for the Seventh Circuit, it should be noted that *Rizzo* was not cited in any of the briefs in *Tubbs.*

(D.C. Cir., 1967), *Powell* v. *United States*, 418 F.2d 470, 473 (D.C.Cir. 1969), and *United States* v. *Sutton*, 426 F.2d 1202, 1211 (D.C.Cir. 1969).

Most of the cases which adopt the "waiver" interpretation of Rule 29(a) do not contain a careful analysis of the problems, including the fundamental constitutional issues involved. In several of the decisions cited by Mr. Justice Douglas in the passage quoted above, the Court's reference to the "waiver" rule is *dictum*.* The decisions adopting the "waiver" rule cite one another, without discussing the issues of principle arising under the Fifth Amendment created by the rule. The only full discussion of those principles is the *Cephus* opinion, which *rejected* the "waiver" rule. See 2 C. Wright, Federal Practice and Procedure, 246-247 nn. 26-27 (1969) and *cf. United States* v. *Goldstein*, 168 F.2d 666, 668-671 (2d Cir. 1948).

The "waiver" imposed on the petitioners by the decision below required them to choose between two rights and forfeit one of them. A defendant has a right guaranteed by Rule 29(a) to an acquittal if the government has failed to prove a *prima facie* case during its case in chief. The defendant also has a Constitutional right to present evidence in his own behalf and to testify in his own behalf. *Washington* v. *Texas*, 388 U.S. 14, 19 (1967); *Ferguson* v. *Georgia*, 365 U.S. 570, 602 (1961) (concurring opinion). No social policy is served by requiring the defendant to "waive" the second right in order to assert the first simply because the trial judge has erroneously violated the first right by denying

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* *United States* v. *Haskell*, 327 F.2d 281, 282 n.2 (2d Cir.), *cert. denied*, 377 U.S. 945 (1964); *United States* v. *Cashio*, 420 F.2d 1132, 1134 (5th Cir.), *cert. denied*, 397 U.S. 1007 (1970); *Cline* v. *United States*, 395 F.2d 138, 144 (8th Cir. 1968).

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the defendant's challenge to the government's failure to prove a *prima facie* case.*

The "waiver" interpretation of Federal Rule 29(a) is in conflict with the Fifth Amendment of the Bill of Rights, as interpreted by this Court in *Garrity* v. *New Jersey*, 385 U.S. 493, 497-499 (1967), and *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964). By hypothesis, the defendant's evidence will only be necessary to make out a *prima facie* case when the government's case-in-chief is insufficient to support a guilty verdict. When it is the defendant's own testimony which supplies a gap in the government's case, that testimony was elicited (again by hypothesis) solely because the trial judge erred in denying a motion for acquittal at the end of the government's case. Reliance upon the defendant's testimony in these circumstances to make out a sufficient case to convict him is contrary to the constitutional policy expressed in the Fifth Amendment that ". . . the government in its contest with the individual shoulder the entire load." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964).**

When the petitioners gave up their Fifth Amendment right not to testify, it was to rebut government proof—proof which did not establish a *prima facie* case against them. Threatened by conviction on evidence which the trial judge erroneously held to be sufficient to support a

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* This Court in dictum has adverted to the waiver rule applied in some of the circuits as an example of a rule imposing a cruel choice on the defendant who must decide whether to risk bolstering the government's case by introducing evidence on his behalf. *McGautha* v. *California*, 402 U.S. 183, 215-16 (1971). This Court did not decide the correctness of the policy underlying the waiver rule or the constitutional problems inherent in applying the waiver principle.

** This Court has recently reaffirmed that the government has an "obligation to prove its case, unaided by the defendant . . . . " *Turner* v. *United States*, 396 U.S. 398, 408 n.8 (1970).

conviction, the petitioners testified under greater duress than the petitioners in *Garrity* v. *New Jersey*, 385 U.S. 493, 497-499 (1967), who abandoned their privilege in order to avert forfeiture of their jobs. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress." (385 U.S. at 498.)*

We submit that this Court should take the opportunity to resolve the conflict among the Circuits on this important constitutional issue.

II.

The Court of Appeals Has Applied the Law Regarding the Inference to Be Drawn from Failure to Call a Witness in a Manner Conflicting with this Court's Decision in Graves v. United States.

In this case, the only unindicted co-conspirator, Edward Kelly, remained under government subpoena throughout

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* In the common law of the early 1600's it was assumed that the privilege against self-incrimination only protected a defendant from being compelled to provide the *first* evidence against himself. Since 1680 it has been established that the government must obtain its *prima facie* case from sources other than the individual. 8 J. Wigmore, Evidence (McNaughton revision) 317 (1961). Even commentators who have discussed *abolition* of the Fifth Amendment privilege against self-incrimination have thought it necessary to require the Government to establish a *prima facie* case before the defendant is called to testify:

> "Suppose privilege against self-incrimination for any criminal defendant were abolished, but a requirement retained that the prosecutor must make his prima facie case without relying upon testimony from the defendant — this requirement being surely a minimum indispensable safeguard under good common law tradition." J. Maguire, Evidence of Guilt, 12-13 (1959).

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the prosecution's case-in-chief. He was the Chief Operating Officer of the institution whose transactions formed the basis of the indictment. He participated in virtually all of the transactions about which proof was offered by the government. He was, in short, a key witness to this case.

At the close of his case, the prosecutor announced that Kelly was in his office. "I decided not to use him [Kelly] as a witness. I tender him to defense counsel for use as their witness." (II App. 467.)* These remarks are a virtual concession of the prosecution's power over Kelly. It is equally clear from the prosecutor's remarks that Kelly was willing to testify for the government, and further that the government had talked to Kelly and knew what his testimony would be. The prosecutor later informed the Court that "the length of our case depended on our using Mr. Kelly or not. Mr. Kelly has been here all week. I have tried to avoid making categorical statements as to whether or not I was going to use him. I did not, in fact decide until last night not to use him." (II App. 489.)

During a recess Kelly declined to speak to defense counsel before being called as a witness. (II App. 480.) Defense counsel informed the Court that they would not call Kelly as a witness for that reason. (II App. 480.)

In *Graves* v. *United States,* 150 U.S. 118, 121 (1893), this Court stated that "... the rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that

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* References are to Volumes I through III of the Appendix filed in the Court of Appeals. Copies of that Appendix will be lodged with the Clerk of this Court.

the testimony, if produced, would be unfavorable.'"* The question whether a witness is peculiarly within the power of one side or the other to produce has been interpreted to extend beyond physical availability, and has been given a pragmatic, realistic interpretation which was not followed by the Seventh Circuit in this case.**

In the case at bar, it is clear that Kelly was available to the government, and that the prosecutor knew what Kelly's testimony would be. It is equally clear that, as a practical matter, Kelly was not "available" to the defense; defense counsel had no way of knowing what Kelly would say if called to the stand.

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* In *Graves* this Court found that the accused was not required to produce his wife because she was not a competent witness, and therefore held that the district attorney should not have been permitted to mention the absent wife in his closing argument. In the case at bar, defendants requested that the jury be informed that they were permitted to draw an unfavorable inference in the form found in *La Buy, Jury Instructions in Federal Criminal Cases*, 33 F.R.D. 523, 601, 602. That request was refused (II App. 33; III App. 963).

** *McClanahan* v. *United States*, 230 F.2d 919, 926 (5th Cir.), *cert. denied*, 352 U.S. 824 (1956) (". . . the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case."); *Burgess* v. *United States*, 440 F.2d 226, 231-239 (D.C. Cir. 1970) (government informer was not equally available to defense even though government produced him in court, but a reversal was not called for where the government had introduced other eye witness evidence.) (Opinions of J. J. Fahy and Robinson.)

The "tender" of Kelly to the defense should not be sanctioned, as it was by the Court of Appeals, as a device for giving the appearance of equal availability. The statement by the Seventh Circuit that there was no reason for defendants to be more apprehensive about Kelly's testimony than for the government to be apprehensive is a perversion of the inference described in *Graves* v. *United States*. This Court should clarify the ground rules in this important area, so that the government is not able to give the mere appearance of equal availability of witnesses.*

III.

The Rule of the Court of Appeals Excluding Petitioners' Expert Accounting Testimony Is a Departure from Principles Underlying the Decision of this Court in Johnson v. United States.

The indictment charged petitioners, *inter alia*, with causing the books and records of a savings and loan falsely

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* Defendants recognize that there may be other reasons, as in *Burgess* v. *United States*, 440 F.2d 226, 231-239 (D.C. Cir. 1970) (cumulative testimony where eye witness testimony produced) for the government's not calling a witness peculiarly within its power, but in the case at bar this point could not be seriously argued. Virtually every witness who testified about the transactions in this case mentioned Edward Kelly, Chief Operating Officer of Apollo. The government argued to the Seventh Circuit that the conspiracy was provable by inference. Kelly was the only unindicted co-conspirator in Count I under which petitioners were convicted, and Count I is the scheme which also forms the basis of the mail fraud Counts IV through VI under which petitioners were also convicted. Therefore, the inference is strong that Kelly would have elucidated the transactions.

to reflect substantial income from the sale of real estate and misapplication of funds.

Petitioners offered the expert testimony of an accountant and savings and loan analyst to the effect that the principal transaction in the case (the Georgetown transaction) would have yielded substantial income to Apollo Savings and Loan.

The Court of Appeals accepted "arguendo" the relevancy of the evidence, but held that the accountant's testimony was excludable because the calculations he made involved simple arithmetic.*

The rule announced by the Court of Appeals focuses upon the simplicity of the arithmetical operations performed by an accountant, such as addition, subtraction, and multiplication, but ignores the skill and expertise required to select the relevant figures from a number of documents and the analysis and judgment required to decide what computations should be performed to arrive at a conclusion. In the instant case, the expert's computations consisted of

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* The Court of Appeals later in its opinion referred to the evidence as of "questionable relevance." The Court of Appeals' earlier assumption of relevance was clearly correct, however. The jury might have concluded from the evidence that the savings and loan stood to make substantial profits from the transaction, and that petitioners were engaged in bona fide transactions and did not intend injury to the savings and loan association. *Compare United States* v. *Matot*, 146 F.2d 197, 198 (2d Cir. 1944); *Duvall* v. *United States*, 94 F.2d 911, 913 (3d Cir. 1938). See also *Hudson* v. *United States*, 55 F.2d 591, 596 (8th Cir. 1932). The point was an important one in showing petitioners' intent in the transactions assailed in the indictment. Petitioners' intent was a crucial element in the government theory of misapplication of funds.

simple arithmetic* but his financial analysis was addressed to an issue calling for expert judgment: the profit and loss effect upon Apollo of several transactions involved in this case.**

The decision of the Court of Appeals results in application of a double standard to this kind of proof. Over defense objections, the District Judge permitted a government witness to testify to the effect that certain reported profits had upon Apollo's ability to make its dividends (II App. 241-245), and to his opinion as to what "good accounting practices in the hypothetical situation" would have called for (question put by the District Judge, II App. 232; also II App. 246-8). Application of this double standard is

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* The computations required, in the expert's opinion, to calculate net gain were set out in Petitioners' Grizaffi & Falcone Exhibit 63, which the expert had prepared, drawing upon other exhibits which were properly in evidence. Exhibit 63, of course, did not explain the expert's reasoning in making his computations, but the law requires such exhibits to be simple and non-argumentative:

> "Whenever possible, such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert . . . witnesses, and they should not be encumbered by . . . impressive, conclusionary captions . . . ." *Lloyd* v. *United States,* 226 F.2d 9, 17 (5th Cir. 1955).

** Defense counsel stated in his summary offer of proof (III App. 930):

> "I offer to prove, your Honor, that under the hypothetical, which is based on the facts in the record, with respect to net investment costs, the options which are in the record, the valuations and appraisals which are in the record, that the net gain to Apollo if the option under the August 30, 1967, contract were exercised by Mr. Grizaffi and Mr. Falcone, would have been $394,699.
>
> "Secondly, I offer to prove that, based on the same figures and the appraisals of Mr. Foley, that the net gain to Apollo or to the hypothetical owner of the land would be $1,275,646, as of May 1969, which was still during the indictment period."

inconsistent with the decision of the Third Circuit in *United States* v. *Caserta*, 199 F.2d 905, 908 (3d Cir. 1953) which held that it was error to exclude defendant's accountant's testimony in view of the fact that the prosecution had presented accountant's testimony.

The rule applied by the Court of Appeals is in conflict with *United States* v. *Johnson*, 319 U.S. 503, 519-520 (1943), in which this Court held that an expert accountant may testify to computations of income and expenditures based on facts which are in evidence, as an aid to the jury's determination. It also is in conflict with other decisions of Courts of Appeals. The value of accounting testimony in assisting the jury was recognized by Judge Learned Hand in *United States* v. *Kelley*, 105 F.2d 912, 918 (2d Cir. 1939):

> "The prosecution's accountants were allowed to present their calculations from the books and returns in evidence. This kind of evidence is always admissible; a jury without such guidance would be totally unable to cope with complicated accounts."

See also *Wirtz* v. *Turner*, 330 F.2d 11, 14 (7th Cir. 1964).

It is interesting to note the contrast between the approach taken by the panel of the Court of Appeals for the Seventh Circuit in this case and that taken by another panel of the Seventh Circuit in *United States* v. *Dellinger*, (7th Cir. November 21, 1972) Docket No. 18295, which held that exclusion of expert testimony was an abuse of discretion where the subject was not equally within the realm of experience of jury members and experts (Slip Opinion p. 62):

> "The resulting presumption that informed opinion will be admitted seems particularly appropriate in our increasingly complex society where specialization and segmentation of knowledge are common, in everyday living as well as at highly technical levels, and in our pluralistic society with its kaleidoscope of political views and life styles. At the same time it seems that people (including jurors), unexposed to increasing pro-

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portions of relevant knowledge and experience, are becoming more capable, because of greater education, of evaluating the expression of expert opinion."

The characterization as basic arithmetical computations of petitioners' accountant's conclusions on the amount of profit realized from a complex transaction is a departure which misconstrues the function and value of expert testimony, and requires correction and clarification by this Court.

CONCLUSION

Petitioners pray that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February 1, 1973.

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit

GORDON, *District Judge.* The defendants Bernard Grizaffi, Leonard Falcone and Carl N. Svejcar were named in a six count indictment. Count I charged a conspiracy under 18 U.S.C. § 371 to do the following: to misapply the funds of the federally insured Apollo Savings and Loan Association (Apollo); to conceal material facts from and falsify statements to the government; to make false entries in the books and reports of Apollo with intent to deceive the Federal Savings and Loan Insurance Corporation (FSLIC) and others; to make false statements for the purpose of influencing the FSLIC; and to devise a scheme to defraud, the attempted execution of which involved the use of the United States mails.

Counts II and III alleged substantive violations of 18 U.S.C. § 1008 with respect to letters sent to an examiner for the Federal Home Loan Bank Board by the defendant Svejcar on December 25, 1965, and January 19, 1966. Counts IV, V and VI involved substantive charges of mail fraud under 18 U.S.C. § 1341 concerning the same scheme alleged in Count I, and specified certain letters caused to be mailed by the defendants.

The defendants Grizaffi and Falcone were building contractors and land developers who had financed dealings with Apollo. The defendant Svejcar was vice president of Apollo, in charge of the "Real Estate Held for Development" department. This case arose mainly out

of an arrangement between the defendants whereby Grizaffi and Falcone were to construct a planned development on 82 acres of land owned by Apollo. The indictment depicted the agreement as one under which Grizaffi and Falcone purchased parcels of the real estate from Apollo by using funds borrowed from other lenders, with Apollo guaranteeing the loans. Apollo also agreed to pay for the improvements to the parcels purchased and hired Grizaffi and Falcone as contractors to make those improvements.

The indictment charged that the defendants caused the books and records of Apollo falsely to reflect substantial income from the sales by failing to reflect the contingent nature of the sales and by grossly understating the actual and estimated costs of improvements. It further charged that the defendants thereby caused Apollo's books and records falsely to show such income as available for semi-annual dividends.

Three paragraphs of the conspiracy count were dismissed prior to trial on the government's motion. Counts II and III were dismissed as to Grizaffi and Falcone at the conclusion of the defendants' case on the government's motion. After a two week trial, a jury returned guilty verdicts against the defendants on all the remaining counts.

The defendants Grizaffi and Falcone claim several errors on this appeal. The defendant Svejcar, who filed a separate brief, reiterates Grizaffi and Falcone's claims and raises additional issues.

SUFFICIENCY OF THE EVIDENCE

The defendants argue that this court is required to test the sufficiency of the government's case in chief, and they contend that the government's evidence failed to establish a *prima facie* case. Since the defendants in-

troduced evidence on their own behalf, however, "our determination must be made in light of *all* the evidence." *United States* v. *Tubbs,* 461 F.2d 43, 45 (7th Cir. 1972) (emphasis added). See also *United States* v. *Calderon,* 348 U.S. 160, 164 (1954). Furthermore, in determining the sufficiency of the evidence, we must view the evidence in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. 60, 80 (1942); *United States* v. *Mims,* 340 F.2d 851, 852 (7th Cir. 1965), *cert. denied,* 381 U.S. 913 (1965).

We do not believe it necessary to detail the extensive evidence presented in this case, nor do we think it valuable for us to state the specific facts which that evidence tended to prove. We have reviewed the briefs, appendices and relevant portions of the record and find that there was ample material evidence from which the jury could find the defendants guilty.

SUFFICIENCY OF THE INDICTMENT

It is urged that the indictment was insufficient insofar as it charged the defendants with wilfully misapplying or conspiring to misapply the funds of Apollo. It is also claimed that the alleged vagueness of the indictment allowed, and was reflected in, a prosecution of the case that continually shifted in theory.

We believe the indictment sufficiently alleged the essential facts constituting the offenses charged. Rule 7(c), Federal Rules of Criminal Procedure. Despite the complexity of the factual circumstances involved, the indictment fairly apprised the defendants of those activities alleged to be unlawful. Count I charged a conspiracy, alleged the illegal objects of that conspiracy, and stated several overt acts said to have been performed in furtherance of that conspiracy. The remaining counts charged

specific substantive violations of federal laws allegedly committed by the defendants. Wilfull misapplication was charged as one of several illegal objects of the conspiracy. As part of a conspiracy charge, it need not be alleged as precisely as would be necessary in a substantive count. *United States* v. *Brandom*, 273 F.Supp. 253, 258 (E.D. Wis. 1967).

Conviction under a conspiracy count is proper if any one of the illegal objects of the conspiracy is sufficiently proved. *United States* v. *Tanner*, ... F.2d ..... (7th Cir. 1972) (Slip Op. No. 17917, March 3, 1972). The conspiracy count charged the defendants with causing false entries to be made in Apollo's books and records, concealing of material facts from government agencies, and devising a scheme to defraud. We find, therefore, that the defendants' challenge to the indictment must fail.

Similarly, the defendants' claim of "shifting theories" on the part of the prosecution is without merit. The defendants point to various portions of a complex record and urge that the government did not understand the facts of the case and was unsure of its direction. We believe the record demonstrates that the government's presentation was designed to confirm the charges in the indictment in a reasonably consistent manner, under the factual circumstances of the case.

"AMENDMENT" OF THE INDICTMENT

As previously noted, three paragraphs of the conspiracy count were dismissed, on the government's motion, prior to trial. Paragraph 4 charged that it was a part of the conspiracy that Grizaffi and Falcone would be able to develop and sell the real estate with no investment or risk of their own. Paragraph 7 charged that

Grizaffi and Falcone would receive construction loans from Apollo, that the proceeds of the loans would go to their lenders, and, therefore, that there would likely be insufficient funds available for construction. Paragraph 8 charged that substantial portions of the construction loans were to be treated as loan fees by Apollo, reflected in Apollo's books as earnings, with the likely result that insufficient funds would be available for construction. The defendants contend that the dismissal of these paragraphs constituted an unconstitutional amendment of the indictment.

In our opinion, the dismissal of paragraphs 4, 7 and 8, particularly coming as it did before trial, did not have the effect of amending the indictment but, instead, merely narrowed the issues presented. *Salinger* v. *United States,* 272 U.S. 542 (1926), *Thomas* v. *United States,* 398 F.2d 531 (5th Cir. 1967).

EXCLUSION OF EVIDENCE

The defendants assign as error the court's exclusion of evidence which, the defendants claim, would have tended to show the profit possibilities of the arrangement. Assuming, arguendo, that such evidence was relevant in a case involving alleged false statements and records, we are not persuaded that exclusion was error.

Testimony of an accounting expert was excluded when it became evident that he would do no more than make basic arithmetical computations with figures supplied to him by counsel. It is a proper exercise of discretion for a court to exclude testimony concerning matters clearly within the realm of jurors' comprehension. *United States* v. *Alker,* 260 F.2d 135, 155 (3rd Cir. 1958).

Other evidence was allowed tending to establish the defendants' point regarding profitability. Furthermore, counsel were permitted to argue the point to the jury, despite its questionable relevance. We are not persuaded that the court abused its discretion in excluding what evidence it did.

REFUSAL TO GIVE INSTRUCTIONS

Error is alleged in the court's refusal to give a missing witness instruction. Edward Kelly, the chief operating officer of Apollo and an unindicted co-conspirator, was under government subpoena during the government's case in chief, but he was not called as a witness. The defendants contacted Kelly before the conclusion of the government's case, and Kelly was brought into the courtroom and made available to the defendants. The record demonstrates that the defendants had it within their power to call him as a witness. They did not do so, however, because Kelly refused to discuss the case with them, and, therefore, they were uncertain of the testimony he might give.

A missing witness instruction allows the jury to draw an unfavorable inference from a party's failure to call a witness when that witness is peculiarly within the party's power to produce, and his production would be natural but for some apprehension about his testimony. *Graves* v. *United States*, 150 U.S. 118, 121 (1893); *Burgess* v. *United States*, 440 F.2d 226, 231 (D.C. Cir. 1971); *Richards* v. *United States*, 275 F.2d 655 (D.C. Cir. 1960).

It cannot fairly be said that Kelly was peculiarly within the control of the government; there is also no reason to believe the defendants had any right to be any more apprehensive about his testimony than the government. Although Kelly, on advice of his attorney, refused to

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discuss the case with the defendants, it simply does not logically follow that his testimony somehow would have been unfavorable to the government.

The defendant Svejcar challenges the court's refusal to give two of his proposed instructions. The first would have called for a not guilty finding on the conspiracy count upon a determination by the jury that he was unaware of the actual method of recording transactions in Apollo's books. Such an instruction would have been improper. Svejcar was charged with conspiring to cause false entries to be made in the books. Proof of knowledge of the mechanics involved in making accounting entries was not required.

The second instruction refused was a general instruction dealing with the defense of good faith with regard to counts II and III. It is clear that the jury was properly advised of such defense by the instructions describing knowledge of the falsity of representations as a prerequisite to a guilty finding. Thus, refusal to give the good faith instruction was not error.

Svejcar also urges reversal on the basis of the court's failure to give an instruction concerning the weight to be given to the testimony of expert witnesses. He asserts that Richard Glomb's responses to hypothetical questions constitute expert testimony necessitating the instruction. Glomb was not presented as an expert. His testimony was elicited through hypothetical questions only after defense objections were made to the form of direct questions. However, even if we were to accept the proposition that the responses thereby became expert testimony, we do not find error in the court's refusal to give the instruction. At the time the instruction was requested, the court asked defendants' counsel whether there had been any expert witnesses. Glomb was not named at that time. The court properly refused the instruction

because those who were named either were not experts or did not give opinions. There is no challenge to the refusal as to those witnesses, and a challenge will not be entertained at this time as to Glomb. Finally, if it were error to have refused this instruction, such error would fall far short of being prejudicial.

THE "KNOWLEDGE" INSTRUCTION

The defendant Svejcar objects to the use of LaBuy Instruction No. 4.05. LaBuy, Manual on Jury Instructions in Federal Criminal Cases, 33 F.R.D. 523, 553 (1963). He claims that the last sentence of the instruction—"No person can intentionally avoid knowledge by closing his eyes to facts which prompt him to investigate"—is allowable only when qualified with specific instructions informing the jury that guilt cannot be based on negligence. We disagree. The instruction plainly states that knowledge cannot be "intentionally" avoided, and, consequently, it does not suggest that negligence is an acceptable basis for a finding of guilt. The instruction is a proper statement of the law. See *United States* v. *Squires,* 440 F.2d 859, 864 (2d Cir. 1971). Furthermore, the court informed the jury in other instructions that convictions could not be based on mistake or accident and that good faith was a defense.

CONDUCT OF THE COURT AND JURY

Finally, the defendants urge that they were denied a fair trial by jury because of the court's "constant interjection as a prosecutor", the "inflection and emphasis" of the court's charge to the jury, and the short period of jury deliberation. We have studied the record, examined the court's charge to the jury, and reviewed the status of the evidence at the time of submission to the jury. The defendants' contentions are without merit.

Affirmed.

Statutes Involved

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 657

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation. Federal Deposit Insurance Corporation, National Credit Union Administration. Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Administration, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits

securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1006

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such

institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1008

Whoever, for the purpose of inducing the insurance of the accounts of any institution by the Federal Savings and Loan Insurance Corporation or for the purpose of obtaining any extension or renewal of such insurance by such Corporation or for the purpose of influencing in any way the action of such Corporation, makes, passes, utters, or publishes any statement, knowing the same to be false; or

Whoever, for the purpose of influencing in any way the action of such Corporation, utters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been uttered, forged, or counterfeited, or willfully overvalues any security, asset, or income, of any institution insured or applying for insurance by said Corporation—

Shall be fined not more than $5,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Federal Rules of Criminal Procedure, Rule 29(a). Motion for Judgment of Acquittal.

(a) Motion Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

December 4, 1972

Before

Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

No. 71-1661

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BERNARD GRIZAFFI, LEONARD D. FALCONE, CARL N. SVEJCAR,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 2, 1973

Before

Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. MYRON L. GORDON, *District Judge*

No. 71-1661
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

BERNARD GRIZAFFI, LEONARD D. FALCONE, CARL N. SVEJCAR,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(70 CR 444)

This matter comes before the Court on the "Petition for Rehearing and Suggestion for Rehearing En Banc" filed herein on December 19, 1972 by counsel for Defendants-Appellants Bernard Grizaffi and Leonard D. Falcone; and the "Petition for Rehearing En Banc" on behalf of Carl N. Svejcar filed herein on December 20, 1972. On consideration whereof, no active judge of this Court having requested a vote as to En Banc Rehearing, and the judges of this panel having voted unanimously,

It Is Ordered that the two above-mentioned petitions for rehearing be and the same are hereby *denied*.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1068

CARL N. SVEJCAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-1069

BERNARD GRIZAFFI AND LEONARD FALCONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pets. Apps.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1972. Petitions for rehearing were denied on January 2, 1973 (Svejcar Pet. App. B). The

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petitions for writs of certiorari were filed on February 1, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused a "missing witness" instruction.
2. Whether testimony of an accountant was properly excluded.
3. Whether the court of appeals' review of the sufficiency of the evidence properly included evidence produced by both the defense and prosecution.
4. Whether the jury was correctly instructed on the knowledge necessary for conviction.
5. Whether petitioner Svejcar's theory of defense was adequately presented to the jury.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of a scheme to falsify the records of a federally-insured savings and loan association and with mail fraud in connection with that scheme, in violation of 18 U.S.C. 371, 1008, and 1341. Petitioner Svejcar was sentenced to four years' imprisonment. Petitioners Grizaffi and Falcone were each sentenced to two years' imprisonment. The court of appeals affirmed (Pets. Apps.).

The facts of the case are not in dispute. Petitioners Grizaffi and Falcone were building contractors and land developers who entered into an agreement with Apollo Savings and Loan Association to construct a development on land owned by Apollo. Petitioner

Svejcar, who was vice president of Apollo, entered into the arrangements on its behalf. The indictment charged that in the course of these arrangements, the records and books of Apollo were falsified in such a manner as to show inaccurate and inflated income flowing to Apollo. Additionally, it was charged that petitioners used the mails in furtherance of their scheme.

ARGUMENT

1. An unindicted co-conspirator, Edward Kelly, served as Apollo's chief operating officer during the transactions in question. Kelly was subpoenaed by the government but never called to testify. He was also "tendered" to the defense who likewise declined to call him because he refused, on the advice of his counsel, to discuss the case prior to testifying (II. App. 467–468, 480, 489).[1] Petitioners contend that because of Kelly's refusal to confer with them prior to testifying, "as a practical matter, Kelly was not available to the defense" (Grizaffi Pet., p. 10). Accordingly, since Kelly is alleged to have been peculiarly within the control of the government, petitioners claim that the jury should have been instructed that they could draw the inference that Kelly would have testified in a manner unfavorable to the government. This claim was properly rejected by the court of appeals.

The facts indicate that Kelly was equally available to both defense and prosecution. The record shows that prior to trial, the prosecution informed counsel

[1] "App." refers to the Appendix filed in the court of appeals, contained in three volumes. Copies have been lodged with this Court.

for the defense that Kelly was available and provided his address. Kelly was also offered to the defense for their use at the close of the government's case (II App. 467–488). As the court of appeals stated (Svejcar Pet. App., p. 6):

> It cannot fairly be said that Kelly was peculiarly within the control of the government; there is also no reason to believe the defendants had any right to be any more apprehensive about his testimony than the government. Although Kelly, on advice of his attorney, refused to discuss the case with the defendants, it simply does not logically follow that his testimony somehow would have been unfavorable to the government.

2. At trial, petitioners offered the expert testimony of an accountant in an effort to prove that the arrangements entered into by them could have conceivably resulted in a profit to Apollo (III App. 917–934). The district court properly sustained an objection to this evidence. As the court of appeals held, it was evident that the accountant would do no more than make simple "arithmetic computations," thus performing a function within the province of the jury (Grizaffi Pet. App., p. 5). The record supports these rulings. The information sought from the witness, as defense counsel conceded, was a matter of "simple multiplication and division" from "data * * * taken out of the record" (III App. 926). It was, therefore, within the discretion of the trial judge to refuse this testimony. See *e.g.*, *United States* v. *Alker*, 260 F. 2d 135, 155 (C.A. 3), certiorari denied, 359 U.S. 906; *United States* v. *Gallagher*, 437 F. 2d 1191 (C.A. 7), cer-

tiorari denied, 402 U.S. 1009. Nor can petitioner Svejcar successfully contend (Pet., pp. 16–21) that this evidentiary ruling precluded the admission of evidence pertaining to the possibility of profit resulting from the Appollo transactions. The facts upon which the accountant was to base his "opinion" were admitted into evidence (III App. 571–572, 920), and petitioners had no difficulty in arguing to the jury that Appollo could have realized "a profit of $1,275,646" from their activities (III App. 999–1000).[2] Moreover, as the district court held, the evidence was of limited relevance to a defense to a charge of falsifying records (III App. 934).[3]

3. Petitioners Grizaffi and Falcone contend (Grizaffi Pet., pp. 4–8) that the determination by the court of appeals that the evidence was sufficient was erroneously based upon evidence presented by the defense as well as the prosecution. This was the proper procedure. This Court, and all but one of the courts of appeals, have now held that "a defendant whose mo-

[2] Petitioners' reliance upon *United States* v. *Johnson*, 319 U.S. 503, is misplaced. Although *Johnson* is authority for the admission of expert accounting testimony under its facts, the thrust of that ruling is that "some discretion [should be allowed] to trial judges in the conduct of a trial and in the appropriate submission of evidence within the general framework of familiar exclusionary rules." 319 U.S. at 519–520.

[3] Petitioner Svejcar's complaint that other evidence was admitted "leaving the impression" that Apollo suffered losses (Pet., p. 17), ignores the fact the evidence which he cites (Pet., pp. 17–18), was admitted without objection. Assuming, what the record does not clearly reveal, that such an improper "impression" was created, the alleged prejudice could have been avoided by a timely objection or cured by a request for a corrective instruction.

tion for acquittal at the close of the Government's case is denied must decide whether to stand on his motion or put on a defense, with the risk that in so doing he will bolster the Government case enough for it to support a verdict of guilty." *McGautha* v. *California,* 402 U.S. 183, 215–216; *United States* v. *Calderon,* 348 U.S. 160, 164; *United States* v. *Haskell,* 327 F. 2d 281, 282, n. 2 (C.A. 2), certiorari denied, 377 U.S. 945; *United States* v. *Feldman,* 425 F. 2d 688, 692 (C.A. 3); *United States* v. *Cashio,* 420 F. 2d 1132 (C.A. 5), certiorari denied, 397 U.S. 1007; *United States* v. *Carabbia,* 381 F. 2d 133, 137–138 (C.A. 6), certiorari denied, 389 U.S. 1007; *United States* v. *Tubbs,* 461 F. 2d 43, 45 (C.A. 7); *Cline* v. *United States,* 395 F. 2d 138 (C.A. 8); *Viramontes-Medina* v. *United States,* 411 F. 2d 981 (C.A. 9); *United States* v. *Greene,* 442 F. 2d 1285, 1286-1287, n. 3 (C.A. 10). *Contra, Cephus* v. *United States,* 324 F. 2d 893 (C.A.D.C.).[4]

4. Petitioner Svejcar urges (Pet., pp. 9–12) that the district court's instruction on the requisite knowledge for conviction was improper because it allowed the jury to find guilt based upon mere negligence. This claim is contradicted by the language of the charge when read in context. The court charged (III App. 1053–1054):

> An act is done willfully if it is done voluntarily and intentionally and with the specific

[4] While the Court of Appeals for the District of Columbia Circuit has held to the contrary in a number of cases decided prior to *McGautha* v. *California, supra* (Grizzafi Pet., pp. 5–6), the issue is not of sufficient importance to warrant review. See *Maffei* v. *United States,* 450 F. 2d 928 (C.A. 6), certiorari denied, 406 U.S. 938.

> intent to do something which the law forbids; *that is to say, with a bad purpose to either disobey or disregard the law, and not by mistake, accident or in good faith.*
>
> Now, the word "knowingly" as used in the crime charged means that *the act was done voluntarily and purposely and not, again, by accident or mistake.*
>
> Knowledge may be proved by a defendant's conduct and by all of the facts and circumstances surrounding the case. No person can *intentionally avoid knowledge* by closing his eyes to facts which prompt him to investigate. [Emphasis added.]

As the court below observed, this instruction was premised on LaBuy, *Manual on Jury Instructions in Federal Crimes Cases,* 33 F.R.D. 523, 553 (1963). The court below properly held that the instruction did not allow negligence as a basis for guilt. Contrary to petitioner's claim, the government was held to proof of an intentional act with actual knowledge of falsity as prescribed by the statute.[5]

5. Finally, petitioner Svejcar argues (Pet., pp. 13–15) that an instruction on his "good faith" defense was improperly refused by the trial judge. The record shows that the refused charge (Pet., p. 13; II App. 36–37) is substantially similar to the instructions actually given. The court instructed (II App. 1056):

> Now, in order to find the defendant Svejcar guilty of the crimes charged in Counts II and

[5] The cases cited by petitioner (Svejcar Pet., p. 10), do not hold that in these circumstances the jury *must* be instructed in so many words "that a person cannot be guilty due to negligence" (Pet., p. 11).

> III of the indictment that I have just reviewed for you, you must find from all of the evidence and beyond a reasonable doubt that the particular statements contained in the respective letters to Ceplecha were, in fact, false and that such defendant knew of the falsity at the time that the statement was made, and that such defendant contributed to and participated in the making of such statement, with the knowledge that it was false.
>
> You must find in order to justify such a verdict of guilty that such defendant took such action for the purpose of influencing some action of the Federal Savings and Loan Corporation. If the evidence should fail to convince you as to such defendant in any one of the respects which I have outlined, then you should find such defendant not guilty as to Counts II and III of the indictment.

This instruction was given in addition to the general instruction set forth earlier (*supra*, p. 7), defining "willfully and intentionally" as meaning "a bad purpose to either disobey or disregard the law, and not by mistake, accident or in good faith."

Under these instructions—albeit in different language—petitioner's theory of good faith was adequately presented to the jury. Unlike the cases cited by him, the instructions here did not fail to give his theory of defense the proper emphasis. The instructions were, moreover, given in direct reference to offenses charged against petitioner in specific counts (see III App. 1056), and cannot be said to have been mere general instructions that would have left petitioner's defense to the "inference and speculation" of the jury.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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